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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1084

BIRDIE MAE DAVIS, EDWIN FOSTER and JAMES E. BUSKEY, et al.,

Petitioners,

versus

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, et al.,

Respondents.

ALFREDO G. PARRISH, et al.,

Petitioners,

versus

BOARD OF COMMISSIONERS OF THE ALABAMA STATE BAR, et al.,

Respondents.

BRIEF OF THE BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
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OPINIONS BELOW

The opinions below are correctly stated by the Petition.

JURISDICTION

The facts upon which the Petition would seek to base jurisdiction are correctly stated. However, review on Writ of Certiorari is not a matter of right, but of sound judicial discretion upon special and important reasons — Rule 19, Supreme Court Rules. This Respondent would respectfully urge that this case does not fit within the character of reasons for review specified in Rule 19.

QUESTION PRESENTED

With respect, this Respondent does not feel that there is presented any question requiring this Court to review the decision of the Fifth Circuit Court of Appeals in *Birdie Mae Davis, et al v. Board of School Commissioners of Mobile County*. This Respondent takes no position with regard to *Alfredo G. Parrish v. Board of Commissioners of the Alabama State Bar*.

STATUTORY PROVISIONS INVOLVED

The statutory provisions referred to in the Petition are correctly stated in the Petition.

STATEMENT OF THE CASE

Respondent will not make a full separate statement of the case. Respondent does, however, desire to amplify certain portions and correct certain portions of the statement of the case relating to *Davis* as presented in the Petition.

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While the identity of counsel is normally of no particular importance, owing to the nature of the issues raised by the Petition in this Court, it is a matter of importance in this instance. Solomon Seay, Esquire of Montgomery, Alabama, was primary counsel for Edwin Foster. It was he who filed the original action in Foster's behalf; it was he who, upon the District Court's dismissal of that action, filed Foster's Complaint in Intervention in the pending class action; and it was he who improperly attempted to impose a class action upon an already existing class action and in connection therewith filed class action oriented interrogatories which were ultimately suppressed by the District Court. Mr. Seay was not counsel in the *Davis* cause and he was not connected with the *Robinson v. Union Carbide* case. (Appendix to Petition, pp. 9a-10a). J. U. Blacksher, Esquire of Mobile, Alabama, joined Mr. Seay as co-counsel in the Foster cause rather late in the proceedings and participated in the District Court only in the proceedings surrounding Foster's Motion to Compel Answers to Interrogatories and the preparation of Foster's Section 144 affidavit. Mr. Blacksher alone was counsel for James Buskey. (Appendix to Petition, p. 10a) He also prepared the Buskey Section 144 affidavit.[1] Mr. Blacksher was also lead counsel in the *Birdie Mae Davis* aspects of the litigation. Contrary to the statement of the case made by the Petition (Petition, pp. 5-6), the NAACP Legal Defense and Education Fund lawyers joined as counsel only in the *Birdie Mae Davis* aspects of the litigation in the District Court; they were not counsel for Foster and they were not counsel for Buskey.

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1 The Foster and Buskey affidavits were identical, word for word, except for a difference in one date referred to in the affidavits.

(Appendix to Petition, pp. 9a-10a). The decision of the District Judge declining to recuse himself came to the Court of Appeals as an interlocutory appeal and was there consolidated with two other appeals, in one of which the NAACP Legal Defense and Education Fund lawyers were counsel of record.[2] This alignment of counsel in both the District Court and the Court of Appeals is made quite clear by the statements of representation contained in the brief of the Plaintiffs-Appellants (who are the Petitioners here) in the Court of Appeals. We have attached as an Appendix to this brief the cover page and the signature page of that brief, where the statements of representation are clearly set out. (Appendix, pp. 1A-3A).

Contrary to the statement in the Petition (Petition, p. 6), while the affidavits of recusal filed by Foster and Buskey were based in part upon a prior opinion entered by the District Judge in *Robinson v. Union Carbide*, they were also equally grounded upon an Order by the District Judge on August 16, 1974 relating to a Motion for Protective Orders and a Motion to Show Cause in the case in which the Section 144 affidavits were filed. (Appendix to Petition, p. 9a).[3] This is of im-

2 There were four separate appeals (No. 74-3894, 75-1312, 75-4257 and 75-1827) consolidated into one proceeding in the Court of Appeals. The NAACP Legal Defense and Education Fund attorneys were attorneys of record in the District Court and in the Court of Appeals only in the matter that came to the Court of Appeals as No. 74-3894, a matter with which Foster and Buskey had no concern. See: Opinion of the Court of Appeals in *Davis v. Board of School Commissioners of Mobile County*, Appendix to Petition, pp. 9a-10a. See also: the Appendix to this brief pp. 1A-3A.

3 See also: Affidavit of Edwin Foster set out as Appendix A to the opinion of the Court of Appeals in *Davis*. This affidavit appears on Pages 13a and 14a of the Appendix to the Petition. The affidavit of James Buskey is identical except for a difference in one date referred to in the affidavits.

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portance because it is reflective of the selectivity employed by counsel in calling to the attention of his clients only carefully selected rulings of the District Court unfavorable to them, rather than all of the Court's rulings in the case, thereby programing the clients for the reaction calculated in advance by counsel as necessary to support the Section 144 affidavits that he desired to file. For example: Foster's cause of action was based solely on his contention that as a black man the Defendant School Board had denied him promotion to a principalship solely because of his race. On the very same day that Foster's attorney filed the Section 144 affidavit alleging bias and prejudice, the District Judge, without a hearing, denied the School Board's written Motion for Summary Judgment which was supported by a sworn affidavit of testimony (uncontroverted by counter-affidavit) establishing conclusively that while Mr. Foster based his Complaint entirely upon the contention that he had sought promotion to the principalship of seven specific schools and had been denied all seven solely because of his race, in fact three of these vacancies had been filled by white applicants and four had actually been filled by other black applicants.[4]

This orchestration of the affidavits by counsel did not escape the attention of the District Court (Appendix to Petition, pp. 2a-3a):[5]

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4 Record on Appeal in the Court of Appeals in Appeal No. 75-1827, Page 120.

5 District Court Order of February 13, 1975 wherein the District Judge declined to recuse himself and certified his ruling to the Court of Appeals upon interlocutory appeal pursuant to 28 USC § 1292(b).

"In support of the affidavit, affiant attached a copy of this Judge's opinion in the case of *Robinson v. Union Carbide*, Civil Action No. 75-83-73-H, a case now on appeal to the Court of Appeals and one of the Court's rulings rendered in *Birdie Mae Davis, et al v. Board of School Commissioners, etc., et al*, Civil Action No. 3003-63-H entered on August 16, 1974, which incidentally is also now a part of an appeal to the Court of Appeals. The affidavit states that affiant, upon the request of his counsel, read the aforementioned opinion and Order and came to his conclusion as a result thereof. No where does it appear in the affidavit or statement that counsel for affiant furnished or offered him a copy of the transcript forming the factual basis for the opinion in *Union Carbide* nor the related Petitions and Orders constituting the basis of the Court's Order of August 16, 1974 in *Birdie Mae Davis*. Such selectivity of evidence has been used through the ages to produce desired results envisioned by the motivating force or at least this was so until the adoption of the Constitution and the Bill of Rights of the United States."

Contrary to the statement in the Petition (Petition, p. 7), the District Judge did not deny the motions calling upon him to recuse himself on the basis that he was not in fact biased or prejudiced. Although he alluded to factual information indicating a lack of bias or prejudice, the legal basis for his denial of the recusal motions was his finding that the affidavits were not

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legally sufficient.[6] In doing so he specifically applied the test put forth by this Court in *Berger v. United States*, 255 US 22, and applied by the Fifth Circuit Court of Appeals in its original panel decision in *Parrish v. Board of Commissioners of the Alabama State Bar*, 505 F.2d 12, (withdrawn sua sponte 509 F2d 540), that the affidavit is sufficient if the facts alleged provide a reasonable basis for the affiant's belief that the judge is prejudiced against him, saying:

> "As this Court interprets the opinion of the Court of Appeals in *Parrish*, supra, when an affidavit such as is found herein is made, there is imposed upon the judge the duty of determining whether or not that affidavit is as required and specified by the statute and is legally sufficient. As this Court understands the test, it is whether the facts alleged could reasonably lead to the belief by the affiant that what the affidavit says exists did in fact exist in the mind of the affiant."

Contrary to the statement in the Petition, (Petition, p. 10) 28 USC §144 does not provide that a judge must disqualify himself upon the filing of *an affidavit* by the party stating that he believes the judge to be biased or prejudiced. The language of Section 144 provides the framework for disqualification upon the filing of a *sufficient affidavit*. The difference between the statement of the Petition that 28 USC §144 simply calls for the filing of an affidavit, and the fact that the precise

6 See: Order of the District Court, February 13, 1975, set out at Pages 1a-4a of the Appendix to the Petition. Note specifically the concluding paragraph at the foot of Page 3a.

language of Section 144 actually refers to the filing of a *sufficient* affidavit may indeed be the crux of this matter, because the decision of the District Court that was appealed, and therefore the decision that was reviewed by the Court of Appeals, was a specific finding by the District Court that the affidavit was not sufficient. (Appendix to Petition, p. 3a).

Contrary to the Petition, the essential basis of the opinion of the Court of Appeals in affirming the District Court, was a finding by the Court of Appeals that the Appellants had not sustained the burden of showing to the Court of Appeals that the District Court had committed an abuse of sound judicial discretion in its determination that the Section 144 affidavits were not legally sufficient.[7]

REASONS FOR NOT GRANTING THE WRIT

As counsel for the Board of School Commissioners of Mobile County we feel ill at ease and somewhat out of place in defending, so to speak, the action of a United States District Judge in response to a charge of bias and prejudice directed at him personally, and the decision of the Court of Appeals which reviewed and affirmed his action. Circumstances, not choice, have placed us in this position. We would seek therefore not to defend the man, but to point out to this Court how the rulings he made on the law were technically sound and correct within the framework of applicable statutes and the prior decisions of this Court.

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7 Opinion of the Court of Appeals, Appendix to the Petition, Page 12a.

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It is unfortunate that *Davis v. Board of School Commissioners of Mobile County* comes to this Court tied to *Parrish v. Board of Commissioners of the Alabama State Bar*. We say this because it may be difficult for this Court to keep in mind that the two cases are totally different in at least one very important, indeed crucial, respect. In *Parrish*, there were certain features of the District Court's relationship to the case and the parties that would seem to bring that case squarely into focus for scrutiny with relation to the provisions of 28 USC §455. There the District Judge had submitted to questions by counsel for the Plaintiffs and in his testimony acknowledged his personal friendship with most of the Defendants, and expressed confidence in the veracity and integrity of key defense witnesses. (Appendix to Petition, pp. 24a-25a; and Petition p. 8). In *Parrish* the District Judge was also a member of the Bar Association that was the Defendant in the proceedings, and the Judge's personal attorney represented one of the parties. (Petition, p. 16). No such circumstances attend *Davis* to link the case so directly with the specific causes for disqualification put forth in 28 USC §455.

The affidavits filed by counsel for Foster and Buskey in the District Court were predicated upon 28 USC §144. They did not concern themselves with 28 USC §455. The District Court therefore had no occasion to construe 28 USC §455 and made no attempt to do so. The District Judge did, under 28 USC §144, have the duty to examine the affidavits and to determine their legal sufficiency. That duty is stated in *Berger v. United States*, 255 US 22 (1921):

> "Upon the making and filing by a party of an affidavit under the provisions of 28 USC §144 of necessity there is imposed upon the judge the duty of examining the affidavit to determine whether or not it is the affidavit specified and required by the statute and to determine its legal sufficiency."

Pursuant to that duty the District Judge did examine the affidavits and found them to be legally insufficient, and made this finding the basis of his Order declining to recuse himself, saying:[8]

> "The Court does not consider that the affidavit is legally sufficient within the meaning of the law."

It is contended by the Petition, as an essential basis for calling upon this Court to review the decisions below, that the decisions below are inconsistent with this Court's decision in *Berger*, supra, because contrary to *Berger* the panel in *Davis* and the en banc majority in *Parrish* insisted that a Section 144 affidavit, "must demonstrate that the judge is in fact biased." (Petition, p. 18). We do not attempt to speak to what the Court said in *Parrish;* but the Court made no such insistence in *Davis*. Quite to the contrary, in *Davis* the tenor of the entire decision is one of recognition and application of the teachings in *Berger* that the affidavit would be sufficient if the facts alleged provide a reasonable basis for the affiant's belief that the judge

8 Order of the District Court, February 13, 1975 found in Appendix to Petition, p. 3a.

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is prejudiced against him; and the Court specifically said:[9]

> "Once the motion is filed under Section 144 the judge must pass on the legal sufficiency of the affidavit, but may not pass on the truth of the matter as alleged" . . . (i.e., the alleged bias and prejudice) . . . "the truth of the matter alleged was not at issue."

Even the Order of the District Court which was before the Court of Appeals for review in *Davis* was based upon total acceptance of this Court's teachings in *Berger*, which formed the basis of the original panel decision in *Parrish* and were subsequently put forth by the dissenters in the *Parrish* en banc decision upon rehearing. In that Order (Appendix to Petition, pp. 1a-2a) the District Court said:

> "Plaintiff-Intervenor, James E. Buskey, having filed an affidavit pursuant to the provisions of 28 USC §144 for the judge to recuse himself from further proceeding in or presiding over any aspects of this trial and the court having considered the same in light of what the court understands to be the law as set forth in *Parrish v. Board of Commissioners of Alabama State Bar*, Court of Appeals Case No. 73-3553, No. 74-1523, (the original panel decision in *Parrish*) denies the same and certifies this issue to the Court of Appeals pursuant to the provisions of 28 USC §1292(b). . . . . as this court interprets the opinion of the Court of

9 Appendix to Petition, p. 11a.

> Appeals in *Parrish*, supra, (the original panel decision) when an affidavit such as is found herein is made, there is imposed upon the judge the duty of determining whether or not that affidavit is as required and specified by the statute and is legally sufficient. As this court understands the test, it is whether the facts alleged could reasonably lead to the belief by the affiant that what the affidavit says exists did in fact exist in the mind of the affiant."

Inasmuch as the opinion of the Court of Appeals in *Davis* affirmed a decision of the District Court which had specifically recognized and specifically adhered to *Berger*, holding an affidavit sufficient if it gives fair support to the affiant's belief, there is no reason for this Court to review *Davis*. Here again, we make no attempt to speak to the Petition as it concerns *Parrish*, because the facts in *Parrish* are not the same as in *Davis*, the holding of the Court of Appeals in *Parrish* does not have the same factual or legal basis as in *Davis*, and the opinion of the Court of Appeals in Davis relies upon *Berger*, rather than *Parrish* for its validity.

Notwithstanding the fact that the affidavits were filed strictly pursuant to 28 USC §144 and made no mention of 28 USC §455, and further notwithstanding that the District Court based its decision upon 28 USC §144 and this Court's decision in *Berger* as interpreted by the original panel decision in *Parrish*, rather than upon an interpretation of 28 USC §455, the Court of Appeals felt constrained in *Davis* to comment upon the effect of Section 455 as newly amended. Actually,

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Appellants (the Petitioners here) in their brief to the Court of Appeals urged this upon the Court of Appeals, taking a position in their brief with which we now find ourselves in complete agreement. There, on Page 31 of their brief (which is reproduced as Appendix 4A to this brief) Petitioners said:

> "Support for the legal standard advanced in *Parrish* (the original panel decision in *Parrish*) has been provided by Congress through enactment of Pub. L. No. 93-512, Section 455(a) (Dec. 5, 1974): 'Any . . . . judge . . . . shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.' Although the act amends 28 USC §455, governing voluntary recusals, and 'is not designed to alter the standard of appellate review on disqualification issues,' H.R. Rep. No. 93-1453, 93rd Cong., 2nd Sess. 120 (1974), *it is inconceivable that, with respect to the fundamental considerations of when a judge should disqualify himself, different legal standards should apply under Section 144 and 455.*" *(emphasis supplied)*

Having persuaded the Court of Appeals, the Petitioner now makes departure and takes a diametrically opposite position in this Court. With respect, this departure is not sound.

While adhering strictly to this Court's decision in *Berger* that an affidavit is sufficient for purposes of Section 144 if the facts alleged provided a reasonable basis for the affiant's belief that the judge is prejudic-

ed against him, the Court of Appeals also adhered to this Court's decision holding that the requisite basis for the bias and prejudice under Section 144 must be extra-judicial. *United States v. Grinnell Corp.*, 384 U.S. 563 (1966) and *Berger*, supra (Appendix to Petition, p. 11a); and other decisions holding that "party" as used in Section 144 does not include counsel as such. *United States Ex Rel Wilson v. Coughlin*, 472 F.2d 100 (7th Cir. 1973) and *Giebe v. Pence*, 431 F.2d 942 (9th Cir. 1970). (Appendix to Petition, p. 10a).

On the other hand the Court of Appeals expressly acknowledged that there could be cases where the cause of the controversy with the lawyer would demonstrate bias of such a nature as to amount to bias against a group of which the party is a member, such as Negroes, and that this would be bias of a continuing and "personal" nature over and above mere bias against a lawyer because of his conduct; and that with regard to the judicial/extra-judicial nature of the conduct, there is an exception where such pervasive bias and prejudice is shown by otherwise judicial conduct as would constitute bias against a party. Nevertheless in reviewing the facts and the written decision of the District Court, the Court of Appeals based its decision upon a determination that there was insufficient basis for such a finding in the circumstances presented to the Court of Appeals by the record in *Davis* (Appendix to Petition, pp. 10a-11a).

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CONCLUSION

We take no position with regard to the Petition as it relates to *Alfredo G. Parrish v. Board of Commissioners of the Alabama State Bar.*

With respect, a Writ of Certiorari should not issue to review the opinion of the Fifth Circuit Court of Appeals in *Birdie Mae Davis, Edwin Foster and James Buskey v. Board of School Commissioners of Mobile County.*

With respect, if a Writ of Certiorari does issue, it should be strictly limited to that portion of the opinion of the Court of Appeals directly relating to Cases No. 75-1312, and 75-1827, in the Court of Appeals, and exclusive of the two other appeals (Nos. 74-4257 and 74-3894) that were a part of the overall consolidation of appeals before the Court of Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Brief of the Board of School Commissioners of Mobile County in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been served upon Michael I. Sovern, Esquire, 435 W. 116th Street, New York, New York, 10027, Charles Stephen Ralston, Esquire, 10 Columbus Circle, Suite 2030, New York, New York, 10019, J. U. Blacksher, Esquire, 1407 Davis Avenue, Mobile, Alabama, 36603 and C. S. White-Spunner, Esquire, P. O. Drawer E, Mobile, Alabama, 36601, by mailing the same to each by First Class United States Mail, properly addressed and postage prepaid on this ____ day of March, 1976.

ABRAM L. PHILIPS, JR.

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APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 74-3894, 74-8484, and 75-1312

BIRDIE MAE DAVIS, et al.,
Plaintiffs-Appellants,
UNITED STATES OF AMERICA,
Plaintiff-Intervenor,
EDWIN FOSTER,
Plaintiff-Intervenor,

versus

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, et al.,
Defendants-Appellees.

No. 74-4257

JAMES E. BUSKEY,
Plaintiff-Appellant,

versus

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, et al.,
Defendants-Appellees.

On Consolidated Appeals from the United States District Court for the Southern District of Alabama

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At the same time, by directing the district judge to disqualify himself from any and all further proceedings in *Birdie Mae Davis*, this Court will provide badly needed and timely reassurance that not even the appearances of judicial partiality will be permitted to undermine public confidence in the federal courts.

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[31] whether they prove actual bias and prejudice in the district judge, but "whether the facts alleged could reasonably lead to the belief that the affidavit says exists in the minds of the plaintiffs." 505 F.2d at 20. This distinction underlines the concern of the federal judiciary and of Congress that "the judicial process [be free] from any hint or appearance of bias," *id.* at 21, quoting *United States v. Columbia Broadcasting System, Inc.*, 497 F.2d 107, 109 (5th Cir. 1974); it "shifts the emphasis from the judge's actual state of mind to the reasonableness of the litigant's fear . . . ." *Parrish, supra*, 505 F.2d at 20 n. 10; Note, *Disqualification of Judges for Bias in the Federal Courts*, 79 Harv. L. Rev. 1435, 1446 (1966).

Support for the legal standard advanced in *Parrish* has been provided by Congress through enactment of Pub.L. No. 93-512, § 455(a) (Dec. 5, 1974): "Any . . . . judge . . . shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Although the act amends 28 U.S.C. § 455, governing voluntary recusals, and "is not designed to alter the standard of appellate review on disqualification issues," H.R. Rep.No. 93-1453, 93rd Cong., 2nd Sess. 120(1974), it is inconceivable that, with respect to the fundamental considerations of when a judge should disqualify himself, different legal standards should apply under Sections 144 and 455. Thus the House Report indirectly approves the rationale of this Court's original *Parrish* opinion when it says concerning the amended Section 455:

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